

## **Guidelines for Judicial Settlement Conferences Before Judge Bacharach**

Judicial settlement conferences are court proceedings, but they are unique and often the format and process vary from judge to judge. These guidelines are intended to inform attorneys and parties of my practices and expectations to aid in the preparation of counsel and their clients.

### **Methods of Negotiation**

There are generally two ways for the parties to negotiate in a settlement conference. The parties can either exchange offers or do something different. Attorneys and parties often expect to negotiate by exchanging offers. The typical benefit is that the parties control the negotiation and retain a sense of power over their offers. A frequent disadvantage is that each party focuses on what the opponent is doing, creating the danger of unnecessary impasses. The plaintiff may stay unreasonably high because of a sense that the defendant is unreasonably low, and vice-versa. I must ultimately determine which means of negotiation to employ, whether to exchange offers, or whether to engage in a different process of negotiation. But I welcome the input of the attorneys and parties, as it is ultimately their negotiation.

### **Facilitative or Evaluative Processes**

In a “facilitative” settlement conference, each side negotiates based on the evaluation that it had when it entered the settlement conference. A facilitative approach may be helpful when the parties have reached an impasse because one or both sides has modified its moves based on a perception of inadequate movement from the opponent. But many times, the

opposing sides enter the settlement conference with substantially different evaluations on liability, damages, recoverable attorney fees, or other issues.

When the parties differ significantly on material issues, they may feel that an evaluative approach would be helpful. Such an approach may involve my review of additional documents - e.g., certain depositions, summary judgment briefs, memoranda on *Daubert* issues - and my expression to both sides of my opinions on the disputed issues.

This process may be helpful when both sides want an objective opinion and are willing to consider it. But when either side is so convinced of its opinion that it is unwilling to consider a neutral opinion, this sort of evaluative process is often counter-productive.

Other evaluative processes may include a non-binding summary jury trial or summary bench trial before or after the judicial settlement conference.

### Requirements for the Conference

The settlement conference order and LCvR 16.2 set forth many requirements, including attendance of lead trial counsel, clients with full settlement authority, and insurers. All of the requirements are important, of course, but the provision for full authority is imperative. Many times, counsel and the client will evaluate the settlement value in advance of the conference. This practice is laudable and encouraged. But the parameters of this evaluation do *not* create the parameters of full settlement authority. The requirement is intended to dictate the attendance of the true decision-maker for the party. If that is the president or general counsel for the company, he or she is required to attend.

The presence of the true decision-maker is essential to preserve the integrity of the process in all cases. As a practical matter, his or her absence is often essential for either party to carry out the purpose of the settlement conference. For example, when the true decision-maker is absent and has already delegated authority based on his or her own evaluation, an evaluative process is often doomed even before it begins. Thus, when the Court employs an evaluative process, the presence of the true decision-makers is particularly important.

#### Prior Settlement Discussions

Consideration of evaluative processes is only meaningful if the parties have exhausted negotiations prior to the judicial settlement conference. Prior discussions are required by Local Civil Rule 16.2(e) and Appendix VI. The purpose of these provisions is to require the parties to exhaust negotiations prior to the judicial settlement conference. The parties have not exhausted negotiations if:

- the plaintiff has refrained from offering its lowest figure based on its evaluation of the case or
- the defendant has refrained from offering its highest figure based on its evaluation of the case.

The parties may feel that they want to save room to negotiate until the judicial settlement conference. But that is not the function of the judicial settlement conference. Until the parties have exhausted negotiations on their own, neither the attorneys nor I can meaningfully assess the impediments to settlement or determine whether a facilitative or

evaluative process should be employed. Thus, mere exchange of offers before the settlement conference is not enough. Instead, the parties should exhaust settlement negotiations prior to the proceeding. The failure to comply may result in cancellation or rescheduling of the proceeding.

#### Duration of the Settlement Conference

As noted above, a settlement conference is unique in some respects. As a result, some take relatively little time and others take a great deal of time. Often it is impossible to tell in advance, or even during the conference, how long the proceeding will take. Unlike most trials, settlement conferences are ordinarily scheduled for one day only. Thus, when a conference requires a lot of time, the Court typically lacks the option of adjourning until the next day. For these reasons, settlement conferences must sometimes extend into the evening.

The Court will never intentionally waste anyone's time. However, for the process to work as intended, all attorneys and client representatives are expected to remain until the end of the conference. If an attorney or client representative anticipates unavoidable problems in complying with this requirement, he or she should contact Ms. Rosene Coleman, (405) 609-5320), administrative assistant for the undersigned, well before the day of the conference.